

APPEAL NO. 020082
FILED FEBRUARY 14, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 12, 2001. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 12th quarter. The claimant appeals, arguing that he was in a work hardening program for most of the qualifying period, and was not released by his doctor to return to work until completion of the program. The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

The claimant contends that the hearing officer erred in determining that he is not entitled to 12th quarter SIBs. The qualifying period for the 12th SIBs quarter was from May 11 through August 9, 2001. The claimant basically takes the position that (1) he was not released by his doctor to return to work until after he had completed a work hardening program that ran from the beginning of the qualifying period until July 12, 2001; and (2) he acted in good faith due to his participation in the work hardening program and then looking for work each remaining week of the qualifying period. The claimant points out that he did obtain employment within a few months after the 12th quarter qualifying period ended. The hearing officer specifically found that the claimant was in a physical rehabilitation program that was not a full-time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission or a private provider.

The criteria for entitlement to SIBs are set forth in Sections 408.142(a) and 408.143. The law regarding SIBs, good faith, and an assertion that there was no ability to work at all during the qualifying periods is discussed in Texas Workers' Compensation Commission Appeal No. 000004, decided February 15, 2000. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) provides that an employee has acted in good faith if the employee

has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work[.]

The hearing officer determined that the claimant did not make a good faith effort to find employment commensurate with his ability to work during the qualifying period for the 12th quarter. The claimant had the burden to prove that he had no ability to work. Texas Workers' Compensation Commission Appeal No. 950582, decided May 25, 1995. The hearing officer was the sole judge of the credibility of the evidence. Section 410.165(a). The evidence does not support claimant's contention that he had no ability to work during the time that he was participating in work hardening. Although the claimant was not

released to work by the treating doctor until he completed the work hardening program, there was a functional capacity evaluation (FCE) completed on the claimant on April 17, 2001, which showed that the claimant could work in a limited capacity. A second FCE done on June 14, 2001, likewise showed that the claimant was able to work with lifting restrictions. These are records showing that the claimant had some ability to work. The hearing officer's determination that the narrative reports from the claimant's treating doctor do not establish an inability to work is supported by sufficient evidence. The hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Michael B. McShane
Appeals Judge

CONCUR:

Terri Kay Oliver
Appeals Judge

Robert W. Potts
Appeals Judge February 15, 2002